



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 25, 2022 Government Records Council Meeting

Dan Riordan
Complainant

Complaint No. 2021-3

v.

Borough of Red Bank (Monmouth)
Custodian of Record

At the January 25, 2022, public meeting, the Government Records Council ("Council") considered the January 18, 2022, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the withheld sections, including those the Complainant asserted were "missing" if in existence, and the redacted Yellow Brook Executive Summary responsive to the Complainant's OPRA request to validate the Custodian's assertion that the records were exempt from disclosure under the trade secret and proprietary exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records where applicable, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 25th Day of January 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 26, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**Dan Riordan¹
Complainant**

GRC Complaint No. 2021-3

v.

**Borough of Red Bank (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of a “complete copy of all proposals” submitted in response to the Borough of Red Bank’s (“Borough”) “Request for Proposal” (“RFP”) for the redevelopment of the White Street Parking Lot in their entirety.

Custodian of Record: Pamela Borghi
Request Received by Custodian: July 22, 2017
Response Made by Custodian: July 24, 2017
GRC Complaint Received: January 6, 2021

Background³

Request and Response:

On July 22, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 24, 2017, the Custodian responded in writing directing the Complainant to the exact location on the Borough’s website where the responsive bids were posted, noting that no other records existed. The Custodian stated that should the Complainant believe that certain records were omitted from the posted bids, he should contact her identifying the name, date, and subject of such. On the same day, the Complainant stated that the posted files included redactions and/or missing pages and thus the files were not complete. The Complainant thus requested that the Custodian disclose the complete bid files. The Custodian again responded stating that the withheld portions of each bid were exempt from disclosure under the “trade secret and proprietary commercial or financial information” exemption. N.J.S.A. 47:1A-1.1.

On December 15, 2020, the Complainant e-mailed the Custodian requesting that the Custodian disclose those withheld portions of the responsive bids because the “project is no longer

¹ No legal representation listed on record.

² Represented by Gregory J. Cannon, Esq., of Sobel, Han & Cannon, LLP (Aberdeen, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

being pursued.” On December 23, 2020, the Custodian responded stating that per the Borough attorney, the withheld portions of the bids remained exempt from disclosure under the trade secret and proprietary exemption.

Denial of Access Complaint:

On January 6, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that he was unlawfully denied access portions of multiple bids responsive to the subject OPRA request as follows:

- Bijou– Section F
- BNE– Section F.
- Dobco – Section IX (and maybe Section X).
- Mill Creek – Pages 13 through 15 and any additional missing pages.
- Yellow Brook – Section F and redacted portions of Executive Summary (page 5 of the bid submission).

The Complainant asserted while some of the bidders may have identified portions of their bids as trade secret or proprietary, not all financial information was included. The Complainant noted that at public meetings concerning the RFP, some bidders “revealed” financial information. The Complainant also argued that it was unclear whether the bidders expressly identified the withheld sections of the bids as trade secret or proprietary; however, he did not understand how their cost proposals could be withheld as exempt under OPRA.

Statement of Information:

On February 22, 2021, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA request on July 22, 2017. The Custodian certified that no search was necessary because the responsive records were posted on the Borough’s website. The Custodian certified that she responded in writing on July 24, 2017 directing the Complainant to the posted bids by website link. The Custodian affirmed that upon receiving the Complainant’s contention that certain portions of the bids were withheld, she responded stating that same were exempt under the trade secret and proprietary exemption. N.J.S.A. 47:1A-1.1. The Custodian certified that she subsequently received a “renewed” OPRA request from the Complainant on December 15, 2020. The Custodian certified that she responded in writing on December 23, 2020 stating that the denied portions of the bids remained exempt per advice of counsel.

The Custodian stated that in early 2017, the Borough advertised an RFP for redevelopment of the White Street Municipal Parking Lot: five (5) developers submitted bids. The Custodian stated that these bids were posted to the Borough’s website in July 2017. The Custodian affirmed that negotiations subsequently failed, and the Borough repealed the RFP on September 13, 2017 via Ordinance No. 2017-33.

The Custodian contended that her response at the time of the original OPRA request was “clearly valid” because the Borough was involved in ongoing negotiations. Renna v. Cnty. of

Union, GRC Complaint No. 2003-100 (February 2004); Fisher v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2006-193 (Interim Order dated June 27, 2007). The Custodian further argued that the Borough's RFP did not contain a confidentiality statement like the one discussed in Barth v. Rutgers Univ., GRC Complaint No. 2017-121 (Interim Order dated April 30, 2019). The Custodian also argued that unlike the records at issue in Newark Morning Ledger, Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011), the bidders' financial strategies, including banking partners, are not widely known or disseminated. The Custodian noted that some of the redacted material is expressly marked confidential. The Custodian argued that these same bidders are also "simultaneously engaged" in other redevelopment projects and regularly compete with each other on other redevelopment projects. The Custodian thus contended that she lawfully denied access to the withheld bid information. See Comment B, Restatement of Torts § 757 (1939); Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 384 (1995).

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

⁴ Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Custodian granted access to the bids submitted in response to the RFP, which were posted to the Borough's website. The Complainant argued in the Denial of Access Complaint that certain sections of those bids were not included in the posted records, some additional pages may have been missing, and redactions were applied to at least one executive summary. The Complainant argued that these records should have been disclosed because bidders shared certain information during public meetings regarding the RFP. The Custodian argued in the SOI that her denial of lawful under the trade secret and proprietary exemption. N.J.S.A. 47:1A-1.1. The Custodian noted that per the Borough's attorney, the exemption still applied regardless of whether the RFP was repealed.

Upon review of the submissions, a "meaningful review" is necessary to determine whether the withheld bid sections and information fall within the asserted exemption. Further, the GRC has routinely reviewed bid records *in camera* in complaints with facts like the present complaint. See McCormack v. State of N.J. Dep't of Treasury, GRC Complaint No. 2013-357 (Interim Order dated September 30, 2014). Thus, the GRC must review same to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the withheld sections, including those the Complainant asserted were "missing" if in existence, and the redacted Yellow Brook Executive Summary responsive to the Complainant's OPRA request to validate the Custodian's assertion that the records were exempt from disclosure under the trade secret and proprietary exemption. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the withheld sections, including those the Complainant asserted were "missing" if in existence, and the redacted Yellow Brook Executive Summary responsive to the Complainant's OPRA request to validate

the Custodian's assertion that the records were exempt from disclosure under the trade secret and proprietary exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

2. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records where applicable, a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

January 18, 2022

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⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."